No. 9400

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 16

GARDEN CITY CANNING COMPANY,
Appellant,

vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,
Appellees.

APPELLANT'S REPLY BRIEF.

LOUIS ONEAL,
First National Bank Building, San Jose, California,
TORREGANO & STARK,
Mills Building, San Francisco, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 9400

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GARDEN CITY CANNING COMPANY,
Appellant,

vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,
Appellees.

APPELLANT'S REPLY BRIEF.

Appellees commence their statement of facts with the admission that the facts are undisputed. They however ignore the facts developed during the course of the hearing before the Special Master on the debtor's application for a discharge. We will refer to these facts in connection with our reply to part IV of appellees' brief.

APPELLEES' CLAIMS WERE NOT PROPERLY FILED WITH THE COURT.

Appellees' first argument is to the effect that under the provisions of Section 77B of the Bankruptcy Act the judge alone could designate the place where claims

could be filed. There are three answers to this contention:

1. The judge referred the proceedings generally to the Special Master (Tr. page 16);

2. The judge having failed to expressly state in his order of March 12th, 1936 where claims were to be filed, and Section 77B of the Bankruptcy Act being silent on this point, the Master had authority to designate the place pursuant to Equity Rule 62 (cf. Appellant's Opening Brief page 12);

3. Even in the absence of Equity Rule 62, the Master's designation was binding because he reported to the Court that notice was given to creditors to file claims in his office and his report was approved by the District Judge. Appellees in effect admit the validity of this argument (Appellees' Brief page 10) when they state: "No action of the Special Master had any binding effect until approved by the judge." The action of the Special Master approving the notice to creditors which directed creditors to file their claims in the office of the Special Master was approved by the District Judge.

GENERAL ORDER IN BANKRUPTCY XX WAS INAPPLICABLE TO THESE PROCEEDINGS.

As the Master pointed out in his opinion (Tr. pages 138-139), General Order XX must be read in conjunction with Section 57C of the Bankruptcy Act and is clearly inapplicable to a proceeding instituted under

Section 77B prior to the entry of an order of liquidation. No order of liquidation has ever been entered in this case. The provisions of Section 77Bc(6) to the effect that the judge shall designate the place where claims are to be filed are clearly inconsistent with the provisions of Section 57C and General Order XX.

General Order XX must also be read in conjunction with Section 51 of the Bankruptcy Act making it the duty of the clerk to transmit to the Referee upon his application all papers filed with the clerk after the reference. Were the term "Referee" to be construed as referring to a Special Master under Section 77B, then we find that the claims were not transmitted by the clerk, and this through no fault of appellant. Appellees' counsel has admitted that he knew that the claims were not to remain in the clerk's office (Tr. page 88). He requested the clerk to act as his agent in forwarding the claims to the "proper Referee." Assuming a duty on the clerk to comply with this request, his failure so to do cannot be charged to appellant.

APPELLEES ARE BARRED BY THE ORDER CONFIRMING THE PLAN AS THE PLAN DID NOT REQUIRE THE PAYMENT OF APPELLEES' CLAIMS.

Appellees' third argument is an attempted answer to appellant's contention that the order confirming the plan of reorganization, after having become final, was an adjudication of the rights of appellees to receive payments under the plan of reorganization.

The entire argument advanced by the appellees under this heading is based on the fact that the debtor's schedules admitted that appellees were creditors and that the plan of reorganization provided for payment to all creditors listed therein in the amounts set forth after their names (these amounts differed from some of the claims as filed). Appellees argue from this premise that the Master's report and the Court's order approving and adopting the same and confirming the plan necessarily directed that payment be made to all creditors enumerated in the plan.

If this argument were valid, it would apply to all creditors who did not file claims[1]—the fourteen creditors who failed to file claims at all, as well as the five appellees who disregarded the notice received by them and filed their claims with the clerk instead of with the Special Master.

The argument is not valid because the District Judge's order of March 12th, 1936 specifically stated that creditors must file claims in order to participate in the plan of reorganization (Tr. page 18).

The debtor's petition for confirmation of the plan of reorganization enumerated the thirty-five creditors who had filed claims (Tr. page 65) and who, therefore, under the order of March 12th, 1936 were entitled to participate in payments under the plan. The notice of the hearing of the petition for confirmation of the plan specifically referred creditors to the contents of the petition (Tr. page 106).

---

[1]Appellees concede this. cf. Appellees' Brief, page 20, line 23.

The Master, in his report, recited that these thirty-five creditors had filed claims (Tr. page 68). The Master's report, accompanied by the debtor's petition for confirmation of the reorganization plan, came on for hearing before the District Court and that Court adopted the Master's report as its findings and confirmed the plan (Tr. page 74). Under the order of March 12th, 1936 only creditors who had filed claims could participate in payments under the plan. Obviously, therefore, the provisions of the plan and of the order confirming the same with reference to the distribution of the payment to creditors could only refer to those creditors who had filed claims.

We therefore respectfully repeat that appellees had several opportunities to call the Court's attention to the fact that the petition for confirmation did not provide for payments to appellees. When they failed to appear before the Master on the hearing of the petition for confirmation, when they failed to appear before the District Judge at his hearing on the Special Master's report and when they failed to appeal from the order approving the Master's report and confirming the plan of reorganization, their right to participate in payments under the plan was forever lost.

> "* * * The provisions of the plan *and* of the order of confirmation shall be binding upon * * * all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have accepted it."
>
> Bankruptcy Act Section 77Bg.

It will be noted that Congress uses the words "plan *and* order." The question raised by the petition for discharge is whether the debtor has complied with the plan as confirmed. As we heretofore pointed out, the order of confirmation found that only thirty-five creditors, which did not include appellees, filed claims and this order, when read with the order of March 12th, 1936, directed payment to these thirty-five creditors referred to in the Master's report.

APPELLEES ARE ESTOPPED FROM OBJECTING TO APPELLANT'S APPLICATION FOR A FINAL DECREE.

Appellees' answer to appellant's contention that appellees are barred by their laches from objecting to the petition for a discharge is predicated on their assertion that appellant is seeking to take advantage of a "windfall".

Appellees have disregarded the testimony adduced before the Master, on the basis of which the Master made his finding of laches.

The failure of appellees to file their claims with the Master did not result in a "windfall". Appellant borrowed just sufficient funds to make the payments required under the plan and it is now insolvent and has no assets other than those pledged to Pacific Can Company, the company which advanced the funds to consummate the plan of reorganization.

Examining the situation purely from the standpoint of the equities involved, this question is presented: Should the loss fall on appellees, who admittedly re-

ceived the notice stating that claims should be filed with the Special Master (Tr. page 3 and Appellees' Brief page 5) but who chose to disregard the same and to disregard the notice of the hearing of the petition for confirmation of the plan and who therefore were in a position to have prevented their loss, or upon the Pacific Can Company and the new creditors, some of whom, like appellees, are farmers (Tr. page 114) and who extended credit in reliance on the fact that the order confirming the plan of reorganization provided for distribution to only the thirty-five creditors who had filed claims.

Whether directly involved in these proceedings or not—it is the fact that it is on these new creditors that the loss must fall, not on the debtor who is already insolvent.

In *In re Wise Shoe Company,* decided December 11th, 1939 and reported in Commerce Clearing House Bankruptcy Law Service ¶ 52266 (not officially reported as yet) the District Court for the Southern District of New York had occasion to pass upon an application to reopen a reorganization proceeding and amend a plan of reorganization at the instance of a creditor who contended that the plan of reorganization amounted to a fraud on it and that it had no knowledge at the time that the plan would have an adverse effect on it. The Court pointed out that if the petitioner had made his objection prior to confirmation, the objection would probably have been sustained but that in the meantime new money had been invested in the enterprise on the strength of the order confirming the plan of reorganization.

> "It would be inequitable to make a substantial change in the plan of reorganization at this late day, to the prejudice of those who have invested new money in the interval."

Counsel for appellees, throughout their brief, lose no opportunity to refer to their clients as farmers. We can only assume that they do so to create an inference that their clients are of a class requiring special protection from the Court. However, it appears from the record that appellees were represented by counsel at all times—at the time when the order of March 12th, 1936 was made (Tr. page 117), at the time when the claims were filed with the clerk [appellees' counsel, not appellees themselves, forwarded the claims to the clerk] (Tr. page 84), and at the time when the Master heard the petition for confirmation of the plan (Tr. page 89).

We heretofore pointed out that counsel for appellees knew that he was not filing the claims at the correct place when he forwarded them to the clerk (Tr. page 88). Neither counsel for appellant nor appellant itself knew that the claims had been filed with the clerk until appellees filed their objections to appellant's petition for a discharge on January 22nd, 1938 (Tr. page 111 ff).

CONCLUSION.

In conclusion, it is respectfully submitted that inasmuch as appellant has carried out its plan of reorganization by paying all creditors who were entitled to

participate in the plan under the order confirming the plan and pursuant to the order of March 12th, 1936, and inasmuch as appellees allowed the order confirming the plan to become final without taking an appeal therefrom, appellant is entitled to a decree of final discharge pursuant to the recommendations of the Master.

Dated, San Francisco, California,
April 19, 1940.

LOUIS ONEAL,
TORREGANO & STARK,
By ERNEST J. TORREGANO,
Attorneys for Appellant.